IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
Second Appeal No.977 of 2006
With
Civil Application No.1625 of 2006

Smt. Marshiya Luise Rebello & ors. Appellants
Vs.
Olga Fernandez Respondent

Mr.Girish R. Agrawal for appellants.
Mr.C.M.Kothari for respondent.

CORAM: B.H.MARLAPALLE,J.

March 26, 2007.

P.C.

. Heard Mr.Agrawal, the learned counsel for the appellants-original defendants in Regular Civil Suit No.19 of 1994. The said Suit was instituted by Olga Fernandez as the successor of her elder sister Angrasia Diyog Rebello and the suit was for possession of the suit house plot No.202, Group Gram Panchayat House No.850(a) from the defendants. It was claimed by the plaintiff that the defendants' licence was revoked and they were in illegal possession of the suit property. The plaintiff had also claimed for mesne profits at Rs.150/- per month from the date of the Suit.

. The original owner of the suit property was one Diego Rebello who had two sons and two daughters

viz. Luis, Deondzio and the daughters Engracia and Olga. Diego Rebello executed a Will on 15/6/1973 and bequeathed all his properties. So far as the suit property is concerned the said Will stated that out of the four galas, two of them were in possession of the two sons separately and the third gala he was occupying with his daughter Engracia whereas in the last gala there was a liquor shop. Both the sons were directed to vacate their respective galas in their possession and to hand over the same to the elder daughter Engracia. She was declared to be the absolute owner of these two galas to be vacated by two sons and she was at liberty to manage both these galas as an owner in any manner she liked. As regards the other two galas the Will stated that it would be first the interest of Engracia in these two galas and she was allowed to stay in the same till her life time and to make use as she liked. However, after her demise the galas were bequeathed to the younger daughter Olga who was made the absolute owner and possessor after the death of Engracia.

. This Will was challenged in RCS No.33 of 1991 and it was upheld by the learned Civil Judge Senior Division at Silvasa as per his judgment and order

dated 27/5/1994. The same was challenged in Regular Civil Appeal No.5 of 1995 and the appeal was dismissed on 4/10/1997. While the suit was pending Engracia Rebello executed the Will at Exhibit 70 in favour of her younger sister - Olga. After the appeal was dismissed Engracia died on 26/1/1998. Thus the validity of the Will executed by Diego Rebello reached its finality way back on 4/10/1997. Both the Courts below rightly held that the validity of the Will and the description of the suit property as set out in the said Will could not be challenged in the subsequent proceedings more so when the earlier litigation had reached finality and the plaintiffs were party to the same. Both the Courts below have unanimously held that the Will dated 15/6/1973 and brought before the trial Court at Exhibit 64 could not be challenged regarding its legality and validity in the suit filed by the plaintiffs. The said Will clearly had made Engracia the owner of two galas and remaining two galas she was to hand over to her younger sister Olga on her demise which she did by her Will at Exhibit 70. It was under these circumstances the trial Court held that the defendants were in possession of the suit house as licensees of the plaintiff and their

allegation that the Will dated 15/6/1973 was executed by playing a fraud and coercion was rejected. The trial Court further held that the plaintiff had lawfully revoked the licence of the defendant by notice dated 31/7/1994. These factual findings based on assessment of the documentary evidence made by the trial Court were not found calling for interference by the lower Appellate Court.

. Mr.Agrawal, the learned counsel for the appellants referred to the scheme of Section 88 of the Indian Succession Act, 1925 and submitted that if there was conflict between the first part and the second part of the Will thereby making out a case of inconsistencies in the two parts, the later part would prevail. In this regard he has relied upon judgment in the case of Balwant Kaur v. Chanan Singh **[(2000) 6 SCC 310]** and submitted that in the instant case the Will at Exhibit 64 also had two parts and as per the second part the liquor shop ownership was given to Luis Rebello and, therefore, the second part must prevail over the first part - ownership of all the property going to Mrs. Olga Fernandez. As the Courts below have rightly held that the issue of legality and validity of the Will at Exhibit 64 had

reached its finality in the earlier round of litigations between the parties and unless that was challenged and the challenge was pending before appropriate Court, it was not open for the defendants to challenge the ownership of Mrs. Olga Fernandez in respect of the suit property. The view taken by the Courts below concurrently is based on the earlier decree having been confirmed and the documentary evidence placed before the trial Court. Under the circumstances there is no substantial question of law that requires consideration by this Court.

. Hence the appeal is dismissed in limine.

. Civil Application does not survive and the same stands dismissed.

(B.H